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## **Guantanamo Detainees: *Habeas Corpus* Challenges in Federal Court**

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# Guantanamo Detainees: Habeas Corpus Challenges in Federal Court

## Summary

After the U.S. Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 to hear legal challenges on behalf of more than 500 persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism (*Rasul v. Bush*), the Pentagon established administrative hearings, called “Combatant Status Review Tribunals” (CSRTs), to allow the detainees to contest their status as enemy combatants, and informed them of their right to pursue relief in federal court by seeking a writ of habeas corpus. Lawyers have filed more than a dozen petitions on behalf of some 60 detainees in the District Court for the District of Columbia, where judges have reached conflicting conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

In one, *Hamdan v. Rumsfeld*, a federal judge ruled that a petitioner must be treated as a prisoner of war until a competent tribunal has decided otherwise, in accordance with the Geneva Conventions, and that the procedural rules the Department of Defense set up to govern military commissions are inconsistent with the Uniform Code of Military Justice (UCMJ), and therefore, the commissions lack jurisdiction. The government temporarily suspended the operation of military tribunals until the D.C. Circuit Court of Appeals reversed the district court’s opinion, and the Supreme Court granted *certiorari*, where the case is pending as of the date of this report.

The Senate approved an amendment introduced by Senator Graham to S. 1042, the National Defense Authorization Act for FY2006, that would require the Secretary of Defense to report to Congress how it determines whether individual detainees are properly detained as enemy combatants, and to give to the District of Columbia Circuit Court of Appeals exclusive jurisdiction to hear appeals of those determinations, but also to foreclose the detainees’ ability to petition for *habeas corpus* in any court. If enacted, the appeals provision of the Graham Amendment may allow detainees to raise many of the claims they might have raised in petitioning for a writ of *habeas corpus*, but may exclude some detainees from seeking any relief. The bill could end litigation at the district court, but may raise constitutional issues with respect to the Suspension Clause (U.S. Const. Art. 1, § 9, cl. 2), whether it amounts to an impermissible “court-stripping” measure to deprive the Supreme Court of jurisdiction over matters of law entrusted to it by the Constitution, and whether such constitutionally sensitive issues can be avoided in light of available alternative procedures.

This report provides an overview of the CSRT procedures, summarizes court cases related to the detentions and the use of military commissions, and summarizes the Graham Amendment and analyzes how it might affect detainee-related litigation in federal court. It will be updated as events warrant.

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# Guantanamo Detainees: *Habeas Corpus* Challenges in Federal Court

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004), a divided Supreme Court declared that “a state of war is not a blank check for the president” and ruled that persons deemed “enemy combatants” have the right to challenge their detention before a judge or other “neutral decision-maker.” The decision reversed the holding of the Court of Appeals for the District of Columbia Circuit, which had agreed with the Bush Administration that no U.S. court has jurisdiction to hear petitions for *habeas corpus* by or on behalf of the detainees because they are aliens and are detained outside the sovereign territory of the United States. Lawyers have filed more than a dozen petitions on behalf of some 60 detainees in the District Court for the District of Columbia, where judges have reached conflicting conclusions as to whether the detainees have any enforceable rights to challenge their treatment and detention.

The Supreme Court granted *certiorari* in *Hamdan v. Rumsfeld* (05-184) to decide whether Congress authorized the President to try suspected terrorists by military commissions and whether detainees can assert rights under the 1949 Geneva Convention in an action for a writ of *habeas corpus* challenging the legality of their detention by the Executive branch. The Senate approved an amendment introduced by Senator Graham to S. 1042, the National Defense Authorization Act for FY2006, that would require the Secretary of Defense to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees’ status,<sup>1</sup> which would be required to preclude evidence determined by the board or tribunal to have been obtained by undue coercion (S.Amdt. 2516 to S. 1042, “the Graham Amendment”).<sup>2</sup> The Graham amendment would, if enacted, give exclusive jurisdiction to the D.C. Circuit Court of Appeals to hear appeals of those determinations as well as final verdicts of military commissions, but would foreclose the detainees’ ability to petition for *habeas corpus* in any court,<sup>3</sup> effectively reversing the *Rasul* decision.

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<sup>1</sup> The amendment refers to both the Combatant Status Review Tribunals (“CSRTs”), the initial administrative procedure to confirm the detainees’ status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees’ continued detention is warranted.

<sup>2</sup> 151 CONG. REC. S12667 (daily ed. Nov. 10, 2005) (introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005).

<sup>3</sup> S.Amdt. 2515 to S. 1042, printed at 151 CONG. REC. S12655 (daily ed. Nov. 10, 2005) (“Graham Amendment”), later amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005).

This report provides background, including an overview of the *Rasul* decision and of the CSRT procedures established to comply with it, summarizes court cases related to the detentions and the use of military commissions, and summarizes the Graham Amendment and analyzes how it might affect detainee-related litigation in federal courts.

## Background

The White House determined in February 2002 that Taliban detainees are covered under the Geneva Conventions,<sup>4</sup> while Al Qaeda detainees are not,<sup>5</sup> but that none of the detainees qualifies for the status of prisoner of war (POW).<sup>6</sup> The Administration has deemed all of them to be “unlawful enemy combatants,” who may be held without trial or even if they are acquitted by a military tribunal. Fifteen of the detainees have been determined by the President to be subject to his military order (“MO”) of November 13, 2001,<sup>7</sup> making them eligible for trial by military commission.<sup>8</sup>

### ***Rasul v. Bush***<sup>9</sup>

Petitioners were two Australians and twelve Kuwaitis (a petition on behalf of two U.K. citizens was mooted by their release) who were captured during hostilities in Afghanistan and are being held in military custody at the Guantanamo Bay Naval Base, Cuba. The Administration argued, and the court below had agreed, that under the 1950 Supreme Court case *Johnson v. Eisentrager* (339 U.S. 763), “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” The Court distinguished *Rasul* by noting that *Eisentrager* concerned the constitutional right to *habeas corpus* rather than the right as implemented by statute. The *Rasul* Court did not reach the constitutional issue, but found authority for federal court jurisdiction in 28 U.S.C. §

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<sup>4</sup> The two most relevant conventions are the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter “GPW”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (hereinafter “GC”).

<sup>5</sup> White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees” (Feb. 7, 2002), available at [<http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>].

<sup>6</sup> For more history and analysis, see CRS Report RL31367, *Treatment of ‘Battlefield Detainees’ in the War on Terrorism*, by Jennifer K. Elsea.

<sup>7</sup> Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 Fed.Reg. 57,833 (2000)(hereinafter “MO” or “military order”).

<sup>8</sup> For an analysis of the military commission rules, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer Elsea.

<sup>9</sup> 124 S. Ct. 2686 (2004).

2241, which grants courts the authority to hear applications for habeas corpus “within their respective jurisdictions,” by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.”<sup>10</sup>

The Court also declined to read the statute to vary its geographical scope according to the citizenship of the detainee. Justice Kennedy, in a concurring opinion, would have found jurisdiction over the Guantanamo detainees based on the facts that Guantanamo is effectively a U.S. territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.” Noting that the Writ of Habeas Corpus (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over *habeas* petitions does not turn on sovereignty over the territory where detainees are held. Even if the *habeas* statute were presumed not to extend extraterritorially, as the government urged, the Court found that the “complete jurisdiction and control” the United States exercises under its lease with Cuba would suffice to bring the detainees within the territorial and historical scope of the Writ.

Without expressly overruling *Eisentrager*, the Court distinguished the cases at issue to find *Eisentrager* inapplicable. *Eisentrager* listed six factors that precluded those petitioners from seeking habeas relief: each petitioner “(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.”<sup>11</sup> The present Court noted that the Guantanamo petitioners, in contrast “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”

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<sup>10</sup> *Rasul* at 2694. When *Eisentrager* was decided in 1950, the *Rasul* majority found, the “respective jurisdictions” of federal district courts was understood to extend no farther than the geographical boundaries of the districts (citing *Ahrens v. Clark*, 335 U.S. 188 (1948)). According to the Court, that understanding was altered by a line of cases recognized in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), as overruling the statutory interpretation that had established the “inflexible jurisdictional rule” upon which *Eisentrager* was implicitly based. Justice Scalia, with Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the *habeas* statute on its face requires a federal district court with territorial jurisdiction over the detainee. The dissenters would have read *Braden* as distinguishing *Ahrens* rather than overruling it. For more analysis of the *Rasul* opinion, see CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis*, by Jennifer K. Elsea.

<sup>11</sup> *Rasul* at 2693 (citing *Eisentrager* at 777).

As to the petitioners' claims based on statutes other than the *habeas* statute, which included the federal question statute<sup>12</sup> as well as the Alien Tort Statute,<sup>13</sup> the Court applied the same reasoning to conclude that nothing precluded the detainees from bringing such claims before a federal court.<sup>14</sup>

The Court's opinion leaves many questions unanswered. It is unclear which of the *Eisentrager* (or *Rasul*) factors would control under a different set of facts.<sup>15</sup> The opinion does not address whether persons detained by the U.S. military abroad in locations where the United States does not exercise full jurisdiction and control would have access to U.S. courts. The Court did not decide the merits of the petitions, although in a footnote the majority opined that "Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" The opinion leaves to lower courts such issues as whether the detentions are authorized by Congress, who may be detained and what evidence might be adduced to determine whether a person is an enemy combatant, or whether the Geneva Conventions afford the detainees any protections. The Court did not address the extent to which Congress might alter federal court jurisdiction over detainees' *habeas* petitions, an issue which is discussed more fully below.

## Combatant Status Review Tribunals

In response to Supreme Court decisions in 2004 related to "enemy combatants," the Pentagon established procedures for Combatant Status Review Tribunals (CSRTs), based on the procedures the Army uses to determine POW status during traditional wars.<sup>16</sup> Detainees who are determined not to be enemy combatants are to

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<sup>12</sup> 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

<sup>13</sup> 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

<sup>14</sup> *Rasul* at 2698 ("nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts").

<sup>15</sup> The Court noted that "*Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus." *Rasul* at 2693 (emphasis original).

<sup>16</sup> See Department of Defense (DoD) Fact Sheet, "Combatant Status Review Tribunals," available at [<http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf>]. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva (continued...)

be transferred to their country of citizenship or otherwise dealt with “consistent with domestic and international obligations and U.S. foreign policy.”<sup>17</sup> CSRTs have been completed for all detainees, and have confirmed the status of 520 enemy combatants. Of the 38 detainees determined not to be enemy combatants, 23 have been transferred to their home States. Presumably, any new detainees that might be transported to Guantanamo Bay will go before a CSRT.

The tribunals are administrative rather than adversarial, but each detainee has an opportunity to present “reasonably available” evidence and witnesses<sup>18</sup> to a panel of three commissioned officers to try to demonstrate that the detainee does not meet the criteria to be designated as an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] ...[including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Each detainee is represented by a military officer (not a member of the Judge Advocate General Corps) and may elect to participate in the hearing or remain silent.

The CSRTs are not bound by the rules of evidence that would apply in court, and the government’s evidence is presumed to be “genuine and accurate.” The government is required to present all of its relevant evidence, including evidence that tends to negate the detainee’s designation, to the tribunal. Unclassified summaries of relevant evidence may be provided to the detainee. The detainee’s personal representative may view classified information and comment on it to the tribunal to aid in its determination but does not act as an advocate for the detainee. If the tribunal determines that the preponderance of the evidence is insufficient to support a continued designation as “enemy combatant” and its recommendation is approved through the chain of command, the detainee will be informed of that decision upon finalization of transportation arrangements (or earlier, if the task force commander deems it appropriate).

In March 2002, the Pentagon announced plans to create a separate process for periodically reviewing the status of detainees.<sup>19</sup> The process, similar to the CSRT

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<sup>16</sup> (...continued)

Conventions and prescribes their treatment in accordance with international law. It does not include a category for “unlawful” or “enemy” combatants, who would presumably be covered by the other categories.

<sup>17</sup> See DoD Press Release, “Combatant Status Review Tribunal Order Issued” (June 7, 2004), *available at* [<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>].

<sup>18</sup> Witnesses from within the U.S. Armed Forces are not “reasonably available” if their participation, as determined by their commanders, would adversely affect combat or support operations. All other witnesses, apparently including those from other agencies, are not “reasonably available” if they decline to attend or cannot be reached, or if security considerations prevents their presence. It is unclear who makes the security determination. Non-government witnesses appear at their own expense. Testimony is under oath and may be provided in writing or by telephone or video.

<sup>19</sup> See DoD Press Release, “DoD Announces Draft Detainee Review Policy” (March 3, (continued...))

process, affords persons detained at Guantánamo Bay the opportunity to present to a review board, on at least an annual basis while hostilities are ongoing, information to show that the detainee is no longer a threat or that it is in the interest of the United States and its allies to release the prisoner. The detainee's State of nationality may be allowed, national security concerns permitting, to submit information on behalf of its national.

## Court Challenges to the Detention Policy

While the Supreme Court clarified that the detainees have at least statutory recourse to federal courts to challenge their detention, the extent to which they may enforce any rights they may have under the Geneva Conventions and other law remains unclear. The Justice Department argues that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*<sup>20</sup> remains applicable to limit the relief to which the detainees are entitled. While one district judge from the D.C. Circuit agreed,<sup>21</sup> others have not, holding for example that detainees have the right to the assistance of an attorney.<sup>22</sup> One judge found that a detainee has the right to be treated as a POW until a “competent tribunal” decides otherwise,<sup>23</sup> but the appellate court reversed. The following sections summarize the three most important decisions as they make their way through the D.C. Circuit Court of Appeals and, it is expected, to the Supreme Court, though their prospects at the high court may depend on congressional action in the interim.

### Khalid v. Bush<sup>24</sup>

Seven detainees, all of whom had been captured outside of Afghanistan, sought relief from their detention at the Guantanamo Bay facility. U.S. District Judge Richard J. Leon agreed with the Administration that Congress, in its Authorization to Use Military Force (AUMF),<sup>25</sup> granted President Bush the authority to detain foreign enemy combatants outside the United States for the duration of the war against al Qaeda and the Taliban, and that the courts have virtually no power to

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<sup>19</sup> (...continued)

2004), available at [<http://www.defenselink.mil/releases/2004/nr20040303-0403.html>].

<sup>20</sup> 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to “enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court’s] jurisdiction”).

<sup>21</sup> *Khalid v. Bush*, 355 F.Supp.2d 311 (D. D.C. 2005).

<sup>22</sup> *Al Odah v. United States*, 346 F.Supp.2d (D. D.C. 2004).

<sup>23</sup> *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (D. D.C. 2004), *rev’d* 415 F.3d 33 (D.C. Cir.), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

<sup>24</sup> 355 F.Supp.2d 311 (D. D.C. 2005).

<sup>25</sup> Authorization for Use of Military Force (“the AUMF”), P.L. 107-40, 115 Stat. 224 (2001).

review the conditions under which such prisoners are held. Noting that the prisoners had been captured and detained pursuant to the President's military order,<sup>26</sup> Judge Leon agreed with the government that "(1) non-resident aliens detained under [such] circumstances have no rights under the Constitution; (2) no existing federal law renders their custody unlawful; (3) no legally binding treaty is applicable; and (4) international law is not binding under these circumstances."<sup>27</sup>

Judge Leon rejected the petitioners' contention that their arrest outside of Afghanistan and away from any active battlefield meant that they could not be "enemy combatants" within the meaning of the law of war, finding instead that the AUMF contains no geographical boundaries,<sup>28</sup> and gives the President virtually unlimited authority to exercise his war power wherever enemy combatants are found.<sup>29</sup> The circumstances behind the off-battlefield captures did, however, apparently preclude the petitioners from claiming their detentions violate the Geneva Conventions.<sup>30</sup> Other treaties put forth by the petitioners were found to be unavailing because of their non-self-executing nature.<sup>31</sup>

The court declined to evaluate whether the conditions of detention were unlawful. Judge Leon concluded that "[w]hile a state of war does not give the President a 'blank check,' and the courts must have some role when individual liberty is at stake, any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens."<sup>32</sup> He dismissed all seven petitions, ruling that "until Congress and the President act further, there is . . . no viable legal theory under international law by which a federal court could issue a writ."

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<sup>26</sup> Although the MO states that it authorizes detention as well as trial by military commissions, only fifteen of the detainees have been formally designated as subject to the MO.

<sup>27</sup> 355 F.Supp.2d at 314.

<sup>28</sup> *Id.* at 320.

<sup>29</sup> *Id.* at 318.

The President's ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to "conduct" or to "make" war; rather, Congress has been given the power to "declare" war. This critical distinction lends considerable support to the President's authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act.

<sup>30</sup> *Id.* at 326.

<sup>31</sup> *Id.* at 327. It may be argued that the habeas statute itself (28 U.S.C. § 2241), which authorizes challenges of detention based on treaty violations, provides a means for private enforcement. See *Eisentrager* at 339 U.S. at 789 (while noting that the 1929 Geneva Convention did not provide for private enforcement, considering but rejecting the *habeas* claim that the treaty vitiated jurisdiction of military commission).

<sup>32</sup> *Id.* at 330 (citations omitted).

## In re Guantanamo Detainee Cases<sup>33</sup>

U.S. District Judge Joyce Hens Green interpreted *Rasul* more broadly, finding that the detainees do have rights under the U.S. Constitution and international treaties, and thus denied the government's motion to dismiss the eleven challenges before the court. Specifically, Judge Green held that the detainees are entitled to due process of law under the Fifth Amendment, and that the CSRT procedures do not meet that standard. Interpreting the history of Supreme Court rulings on the availability of constitutional rights in territories under the control of the American government (though not part of its sovereign territory), Judge Green concluded that the inquiry turns on the fundamental nature of the constitutional rights being asserted rather than the citizenship of the person asserting them. Accepting that the right not to be deprived of liberty without due process of law is a fundamental constitutional right, the judge applied a balancing test to determine what process is due in light of the government's significant interest in safeguarding national security.<sup>34</sup> Judge Green rejected the government's stance that the CSRTs provided more than sufficient due process for the detainees. Instead, she identified two categories of defects. She objected to the CSRTs' failure to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and the failure to permit the assistance of counsel to compensate for the lack of access. These circumstances, she said, deprived detainees of a meaningful opportunity to challenge the evidence against them.

Second, in particular cases, the judge found that the CSRTs' handling of accusations of torture and the vague and potentially overbroad definition of "enemy combatant" could violate the due process rights of detainees. Citing detainees' statements and news reports of abuse, Judge Green noted that the possibility that evidence was obtained involuntarily from the accused or from other witnesses, whether by interrogators at Guantanamo or by foreign intelligence officials elsewhere, could make such evidence unreliable and thus constitutionally inadmissible as a basis on which to determine whether a detainee is an enemy combatant. Judge Green objected to the definition of "enemy combatant" because it appears to cover "individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." She noted that government counsel had, in response to a set of hypothetical questions, stated that the following could be treated as enemy combatants under the AUMF: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source."<sup>35</sup> Judge Green stated that the indefinite detention of a person solely because of his contacts with individuals or organizations tied to terrorism, and not due to any direct

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<sup>33</sup> 355 F.Supp.2d 443 (D. D.C. 2005).

<sup>34</sup> *Id.* at 465 (citing *Hamdi v. Rumsfeld*).

<sup>35</sup> *Id.* at 475 (internal citations omitted).

involvement in terrorist activities, would violate due process even if such detention were found to be authorized by the AUMF.<sup>36</sup>

The D.C. Circuit Court of Appeals is considering the government's appeal with respect to the holding that the detainees have enforceable rights under the Constitution and international law, as well as appeals by some detainees with respect to other aspects of Judge Green's decision. Oral arguments were heard September 8, 2005 on this case as well as the detainees' appeal of the *Khalid* decision, *supra*.

### **Hamdan v. Rumsfeld<sup>37</sup>**

Salim Ahmed Hamdan, who was captured in Afghanistan and is alleged to have worked for Osama Bin Laden as a body guard and driver, brought this challenge to the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened pursuant to the President's military order. Hamdan's attorney objected to the military commission rules and procedures, which he argued were inconsistent with the UCMJ<sup>38</sup> and Hamdan's right to be treated as a prisoner of war under the Geneva Conventions. U.S. District Judge Robertson agreed, finding that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including under their protections all persons detained in connection with the hostilities there.<sup>39</sup> Accordingly, he ruled, Hamdan was entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war). The D.C. Circuit Court of Appeals, in an opinion written by Judge Randolph, reversed that finding, ruling that the Geneva Conventions are not judicially enforceable,<sup>40</sup> and that in any event, the military commission would qualify as a "competent tribunal" within the meaning of U.S. Army regulations implementing the Conventions.<sup>41</sup> Judge Williams wrote a concurring opinion, agreeing with the government's conception of the conflict with Al Qaeda as separate from the conflict with the Taliban, but construing Common Article 3 to apply to any conflict with a non-state actor, without regard to the geographical confinement of such a conflict within the borders of a signatory state.

With respect to the President's military order establishing military commissions, the district court judge had found no inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals, and that existing statutory authority for military commissions is limited. Interpreting the statute in light of the Geneva Conventions, which permits the punishment of prisoners of war

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<sup>36</sup> *Id.* at 476.

<sup>37</sup> 344 F.Supp.2d 152 (D. D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

<sup>38</sup> 10 U.S.C. §§ 801 *et seq.*

<sup>39</sup> *Id.* at 161 (rejecting the government's position that the military is engaged in two separate conflicts in Afghanistan, respectively, against the Taliban and against Al Qaeda).

<sup>40</sup> 415 F.3d at 39.

<sup>41</sup> *Id.* at 43-44.

“only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,”<sup>42</sup> Judge Robertson found no congressional authority for Hamdan’s trial under the DoD’s rules for military commissions. He found these rules to be fatally inconsistent with the UCMJ (contrary to UCMJ art. 36, 10 U.S.C. § 836) because they give military authorities the power to exclude the accused from hearings and deny him access to evidence presented against him.<sup>43</sup> The Circuit Court reversed, opining that Congress did not mean that all of the UCMJ procedural rules for courts-martial should apply to military commissions. Instead, the panel interpreted art. 36 to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions. The Supreme Court has agreed to review the case.<sup>44</sup>

## The Graham Amendment

The Senate approved an amendment to its Defense Authorization bill (S. 1042, passed by roll call vote November 15, 2005), to require the Defense Department to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees’ status,<sup>45</sup> which would be required to preclude evidence determined by the board or tribunal to have been obtained by undue coercion (S.Amdt. 2516 to S. 1042, “the Graham Amendment”).<sup>46</sup> The amendment would neither authorize nor require a formal status determination, but it would require that the Judiciary and Armed Services Committees be notified 30 days prior to the implementation of any changes to the rules. It does not contain similar requirements with respect to the rules for military commissions.

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<sup>42</sup> GPW art. 102.

<sup>43</sup> 344 F.Supp.2d at 166.

<sup>44</sup> Hamdan v. Rumsfeld, *et al.*, No. 05-184. The questions presented are:

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the “war on terror” is duly authorized under Congress’s Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?
2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

<sup>45</sup> The amendment refers to both the Combatant Status Review Tribunals (“CSRTs”), the initial administrative procedure to confirm the detainees’ status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees’ continued detention is warranted.

<sup>46</sup> 151 CONG. REC. S12667 (daily ed. Nov. 10, 2005)(introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005).

## Judicial Review

The most controversial portion of the Graham Amendment would amend 28 U.S.C. § 2241 to eliminate the federal courts' statutory jurisdiction over *habeas* claims by aliens detained by the Department of Defense at Guantanamo Bay. Section 1092(d) of S. 1042 would add a new subsection (e) to 28 U.S.C. § 2241:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States (as that term is defined in section 101(a)(38) of the Immigration and Naturalization Act (8 U.S.C. 1101(a)(38))) who is detained by the Department of Defense at Guantanamo Bay, Cuba.<sup>47</sup>

Section 1092 would eliminate all federal court jurisdiction over *habeas* cases on behalf of the detainees, possibly including cases pending at the bill's enactment.<sup>48</sup> Any alien in DoD custody at Guantanamo Bay for any reason other than enemy combatant status would likewise be precluded from seeking *habeas* relief. The amendment would not foreclose or limit any legal avenue other than *habeas corpus* that might be available to the detainees to seek relief. Suits for damages or petitions seeking injunctive relief, for example, would not be affected. In addition, the amendment would provide for limited appeals of status determinations made pursuant to the DoD procedures for Combatant Status Review Tribunals (CSRTs)<sup>49</sup> and appeals of final decisions of military commissions.<sup>50</sup>

**Appeals of Status Determinations.** The D.C. Circuit Court of Appeals would have exclusive jurisdiction to hear appeals of any “decision of a Designated Civilian Official . . . that an alien is properly detained as an enemy combatant.” The scope of “propriety of detention” is somewhat ambiguous. While *habeas* review would ordinarily be limited to whether a detainee has been determined by fair process to fit the criteria for classification as an enemy combatant, appellate review could potentially be broader, possibly encompassing determinations as to whether the detainee poses a security risk or possesses valuable intelligence information such that his detention is proper to accomplish stated DoD policy aims. However, the scope

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<sup>47</sup> 28 U.S.C. § 2441 refers to federal courts only. The Graham Amendment could be read to preclude *habeas* actions in state courts as well, or, if interpreted in the context of the section as amended, could be read as limited to federal courts.

<sup>48</sup> Subsection (e)(1) states that “(e)xcept as provided in paragraph (2), this section shall take effect on the day after the enactment of this Act.” Paragraph (e)(2) provides that the paragraphs of subsection (d) that provide for appellate review of CSRT and final decisions of military commissions are effective (presumably, on the date of enactment) with respect to claims whose review is governed by those paragraphs that are pending on or after the date of enactment. The disposition of pending *habeas* cases whose review would *not* be governed by the appeals provisions remains unclear, including interlocutory claims related to the proceedings of military commissions, claims related to treatment and living conditions, or claims by detainees who have been determined to be “no longer enemy combatants” but remain in DoD custody.

<sup>49</sup> S. 1042 § 1092(d)(2)(engrossed as passed by the Senate).

<sup>50</sup> *Id.* § 1092(d)(3).

of review by the appellate court is expressly limited to the consideration of two types of claims.

Section 1092(C)(i) of S. 1042 would provide for the consideration of whether the determination applied the “correct standards” and complied with applicable DoD procedures for CSRTs (including whether it is supported by the preponderance of the evidence, but allowing a rebuttable presumption in favor of the government). It is not clear what the “correct standards” might encompass; the language might be intended to refer to standards prescribed within the CSRT rules, but it could be interpreted more broadly to cover such considerations as whether they are necessary and appropriate to ensure the AUMF is properly implemented and its scope not exceeded.

Section 1092(C)(ii) would allow appeals based on claims that “subjecting an alien enemy combatant to such standards and procedures is [in]consistent with the Constitution and laws of the United States.” The provision does not specifically make reference to treaties of the United States or the international law of armed conflict, but the appellate court might treat these as incorporated into U.S. law by the Supremacy Clause<sup>51</sup> or the UCMJ.<sup>52</sup> Appellate jurisdiction would cease upon the detainee’s transfer from DoD custody. If a detainee is transferred to the custody of another U.S. agency, jurisdiction under the *habeas* statute would no longer be constrained by the amendment.

The Graham Amendment does not elaborate on the role of the “Designated Civilian Official” whose decision may be appealed. As the CSRTs were initially established,<sup>53</sup> the final approval of CSRT decisions was the responsibility of the

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<sup>51</sup> U.S. CONST. art VI, cl. 2 provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” The language of the Graham Amendment, by including “the Constitution and the laws of the United States” and omitting reference to treaties, may be intended specifically to exclude treaties. On the other hand, statutes and regulations are generally interpreted with an assumption that they are intended to comply with international legal obligations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains....”).

<sup>52</sup> 10 U.S.C. §§ 801 *et seq.* Offenses against the law of war are incorporated in articles 18 and 21 (10 U.S.C. §§ 818 and 821). *See ex parte Quirin*, 317 U.S. 1, 29 (1942).

Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction. Congress has the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by the military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

<sup>53</sup> Memorandum, Assistant Secretary of Defense Paul Wolfowitz for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (June 7, 2004), *available at* [<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>](last visited Nov. 12, 2005).

convening authority,<sup>54</sup> and there was no mention of a “designated civilian official,” although this might be a reference to the role of the Secretary of the Navy, to whom the order establishing CSRTs was addressed.<sup>55</sup> The procedures established by Secretary England refer to the position of Director, CSRT, who appears to be the convening authority for the tribunals and the official whose final approval is required (currently a military officer).<sup>56</sup> At any rate, it does not appear that the Graham Amendment would give the D.C. Circuit Court of Appeals jurisdiction to review CSRT determinations that have not been made or approved by a civilian official who had been appointed with the advice and consent of the Senate, but a court might interpret the provision more broadly in order to give the provision effect.

The restriction on the use of evidence obtained through undue coercion to be incorporated into the CSRT rules would apply prospectively only, and would be unavailable as a means to challenge determinations with respect to detainees who have already been determined to be enemy combatants. The limitation on the use of such evidence would apply to the administrative review boards each detainee is to receive annually, but it appears that these decisions are not subject to review pursuant to the appeals provision. On the other hand, the amendment does not define “combatant status review tribunal,” and the provision for jurisdiction over an appeal of any “decision . . . that an alien is properly detained as an enemy combatant” could be read broadly to include the decisions related to the annual administrative reviews or simply to any decision regarding whether to release or transfer a detainee, which might not depend entirely upon the status determination.<sup>57</sup> The court could also

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<sup>54</sup> Rear Adm. James M. McGarrah currently serves as convening authority for the CSRTs, which have made determinations for all current detainees.

<sup>55</sup> *See id.* The Department of Defense appointed the Secretary of the Navy, Gordon England, to be the designated civilian official to operate and oversee the annual administrative review boards set up to determine the continued detention of persons affirmed by CSRTs to be enemy combatants at Guantanamo Bay Naval Base, Cuba. *See* Press Release, Department of Defense, Navy Secretary to Oversee Enemy Combatant Admin Review (June 23, 2004), *available at* [<http://www.defenselink.mil/releases/2004/nr20040623-0932.html>](last visited Nov. 12, 2005).

<sup>56</sup> *See* Memorandum, Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Station, Cuba, July 29, 2004, *available at* [<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>](last visited Nov. 12, 2005).

<sup>57</sup> According to DoD, it has released 180 detainees and released 76 detainees to foreign governments. *See* DoD Press Release, “Detainee Transfer Announced” (Nov. 5, 2005), *available at* [<http://www.defenselink.mil/releases/2005/nr20051105-5073.html>]. Not all of them have been released pursuant to determinations by CSRTs. *See* DoD Fact Sheet, Guantanamo Detainees, *available at* [<http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf>] (describing detainee review process to determine whether detainees pose a threat).

An elaborate process is in place to identify enemy combatants to be held at Guantanamo, assess the threat they pose to the U.S. and the international community, and regularly review all available information to make sure that their continued detention is necessary. Detainees have been released when it is believed they no longer pose a significant threat,

(continued...)

address the admissibility of evidence procured through coercion under the constitutional basis for review to determine whether due process requires that CSRTs exclude such evidence.

**Appeals of Military Commission Decisions.** The Graham Amendment would also provide for an appeal to the Court of Appeals for the District of Columbia Circuit of final decisions rendered pursuant to Military Commission Order No. 1 (“MCO No. 1”) or successor order. The court would be required to review capital cases or cases in which the alien was sentenced to a term of imprisonment for 10 years or more, but it could hear other cases at its discretion. “Final decision” is not defined; presumably final verdicts and sentences would qualify, while interlocutory challenges to the proceedings would not. However, federal appellate courts sometimes treat an order that is not a complete disposition of a case as “final” and therefore ripe for review. The final decision of the military commission is defined in MCO No. 1 to be the result of the post-trial review and approval of the military commission’s finding by the President, or the Secretary of Defense, if the President delegates the authority to him.

The scope of review would be limited to considering whether the decision applied the correct standards and was consistent with MCO No. 1, and whether “subjecting an alien enemy combatant to such order is consistent with the Constitution and laws of the United States.” Again, the “laws of the United States” may include more than just statutes; judicial precedent, treaties, and consistent regulations may also provide sources for formulating these standards. In particular, appellate review of military commission procedures and decisions would seem to require at least some interpretation of the international law of war and relevant treaties.

## Constitutional Considerations

The Graham Amendment could be interpreted as congressional ratification of the President’s detainee policies, including the implementation of CSRTs and military commissions for persons deemed to be enemy combatants. If enacted, it may put to rest many of the constitutional separation of powers issues surrounding the President’s conduct of the war on terrorism, fleshing out somewhat the scope of authority granted in the AUMF. Or it may prevent such questions from reaching the Supreme Court. On the other hand, it may give rise to even more litigation concerning its interpretation and whether it violates the Constitution’s Suspension Clause or exceeds Congress’s authority to regulate the jurisdiction of federal courts.

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<sup>57</sup> (...continued)

and they have been transferred to the custody of their governments when those governments are prepared to assume responsibility for ensuring that the detainees will not pose a threat to the United States.

## The Suspension of *Habeas Corpus*

The Writ of Habeas Corpus (*ad subjiciendum*), also known as the Great Writ, has its origin in Fourteenth Century England.<sup>58</sup> It provides the means for those detained by the government to ask a court to order their warden to explain the legal authority for their detention. In the early days of the Republic, its primary use was to challenge executive detention without trial or bail, or pursuant to a ruling by a court without jurisdiction, but the writ has expanded over the years to include a variety of collateral challenges to convictions or sentences based on alleged violations of fundamental constitutional rights.<sup>59</sup> A court reviewing a petition for *habeas corpus* does not determine the guilt or innocence of the petitioner; rather, it tests the legality of the detention and the custodian's authority to detain. If the detention is not supported by law, the detainee is to be released.<sup>60</sup> Minor irregularities in trial procedures that do not amount to violations of fundamental constitutional rights are generally to be addressed on direct appeal.<sup>61</sup>

Given the emphasis the *Rasul* Court placed on the distinction between the statutory and constitutional entitlement to *habeas corpus*, it would seem reasonable to suppose that Congress might easily revoke by statute what it had earlier granted without offending either the Court or the Constitution. However, the special status accorded the Writ by the Suspension Clause of the Constitution complicates matters.

Article I, § 9, cl. 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the Graham Amendment amounts to a suspension of the writ of *habeas corpus*, the Supreme Court could take up the question of whether a "case of rebellion or invasion" exists and whether the federal courts' consideration of the detainees' petitions actually endangers the public safety to such a degree that suspension of the writ is warranted. If, on the other hand, the amendment represents the mere regulation of procedures for seeking relief, or eliminates a statutory right not guaranteed by the Constitution, then the Supreme Court may rule itself ineligible to review detainee cases.

While the federal courts' power to review petitions under *habeas corpus* has historically relied on statute,<sup>62</sup> it has been explained that the Constitution obligates Congress to provide "efficient means by which [the Writ] should receive life and

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<sup>58</sup> For a general background and description of related writs, see 39 Am. Jur. 2d. *Habeas Corpus* § 1 (1999).

<sup>59</sup> See generally Sen. Doc. 108-17 at 848 *et seq.*

<sup>60</sup> *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

<sup>61</sup> 39 Am. Jur. 2d. *Habeas Corpus* § 27 (1999).

<sup>62</sup> *Ex parte Bollman*, 8 U.S. (4 Cr.) 75 (1807).

activity.”<sup>63</sup> The Court presumes that “the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.”<sup>64</sup> Consequently, the Court may be unwilling to permit Congress to eliminate *habeas* rights it previously granted, at least to the extent that no other avenue of relief is available.<sup>65</sup>

Congress's authority to control the courts' jurisdiction over *habeas* cases was tested in the aftermath of the Civil War. As part of its Reconstruction efforts, Congress broadened the scope of the Writ to provide for review of convictions of state courts and to give the Supreme Court appellate jurisdiction in *habeas corpus* cases. Prior to that time, the Supreme Court could review *habeas* decisions only by issuing an original writ of *habeas corpus* combined with *certiorari*. However, when the Court's new appellate review appeared to threaten the legitimacy of much of the Reconstruction legislation, including a statute that allowed military trials of civilians in formerly Confederate states, Congress hastily revoked the Supreme Court's appellate jurisdiction over *habeas* cases. The Supreme Court upheld Congress's authority to revoke its appellate jurisdiction, even though it had already heard arguments in the case of *McCardle*, a civilian held for trial by a military commission in Mississippi. Upon dismissing *McCardle*'s appeal, however, the Court remarked:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.<sup>66</sup>

Shortly after the *McCardle* case, the Supreme Court, in agreeing to review the case of another civilian held by military authority, confirmed that it could indeed continue to issue original writs of *habeas corpus* and *certiorari* notwithstanding the repeal of the 1867 law.<sup>67</sup> Repeal of those parts of the Judiciary Act of 1789 that conferred power on the Supreme Court to review *habeas* cases was not to be found by implication. Congress made no effort to further diminish the Court's *habeas* jurisdiction, leaving open the question whether such an effort would amount to a violation of the Suspension Clause.

The Supreme Court had an opportunity to revisit the question after Congress in 1996 passed the Antiterrorism and Effective Death Penalty Act (AEDPA), part of which restricted successive *habeas* petitions by prisoners in state custody. Until 1867, prisoners held pursuant to convictions in state courts were not eligible to seek

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<sup>63</sup> *Id.* at 94.

<sup>64</sup> *Felker v. Tupin*, 518 U.S. 663 (1996)(citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

<sup>65</sup> *Cf. id.* (Holding that restrictions on successive petitions for *habeas corpus* by prisoners convicted in state courts did not suspend the writ, but merely applied a modified *res judicata* rule to control abuse of the writ).

<sup>66</sup> *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868).

<sup>67</sup> *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

federal *habeas* relief,<sup>68</sup> yet it remains unclear whether Congress is free to revoke such jurisdiction without effecting a suspension of the Writ. In *Felker v. Turpin*,<sup>69</sup> the Supreme Court followed its holding in *ex parte Yerger* to interpret a section of the AEDPA preventing its review of orders denying leave to file a second *habeas* petition as leaving intact the Supreme Court's power to consider original petitions for *habeas* relief, apparently avoiding an unconstitutional "suspension" of the Writ, or at least avoiding the need for the Court to determine whether the Suspension Clause was in fact implicated.

The Graham Amendment appears to be less equivocal with respect to the rights of a narrowly defined class of persons to petition for *habeas* relief: no jurisdiction, whether original or appellate, will lie in federal court for petitions on behalf of aliens detained by the military at Guantanamo Bay. If the amendment is enacted, the Court may find it necessary to resolve the question of the Suspension Clause's effect on Congress's authority to regulate the jurisdiction of federal courts, particularly the Supreme Court.

## Limiting Court Jurisdiction

At the brink of the Suspension Clause issue is the question whether the relief available under *habeas* may be available under other procedures. In addition, the question arises as to whether the Graham Amendment, by limiting certain procedural routes to challenge the Guantanamo detainees' detention and treatment, would limit the vindication of constitutional rights and unconstitutionally usurp the role of the federal courts. A definitive interpretation of the effect of the Graham Amendment is difficult, however, since many of the constitutional and procedural issues raised by the detentions at Guantanamo remain unresolved.

Generally, it would appear that there are two categories of cases that are likely to be brought by detainees at Guantanamo: cases challenging the fact or length of a detainee's incarceration, and cases challenging the conditions under which a detainee is being held. While there may be some overlap, these two categories may involve different procedural routes and the application of different constitutional rights.

**The Fact and Length of Detention.** As noted above, the Supreme Court has found that the Guantanamo detainees presently have a statutory right to petition a federal district court for a writ of *habeas corpus*<sup>70</sup> based on claims that they are held

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<sup>68</sup> See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99 (1807)(interpreting Section 14 of the Judiciary Act of 1789, which established the jurisdiction of federal courts over *habeas corpus* and other matters, to withhold from state prisoners access to the federal writ of *habeas corpus*). For an analysis of why the interpretation may have been in error, see Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said It, Doesn't Make it So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000).

<sup>69</sup> 518 U.S. 651 (1996).

<sup>70</sup> 28 U.S.C. §§ 2241(a), (c)(3).

"in custody in violation of the Constitution or laws or treaties of the United States."<sup>71</sup>

In general, writs of *habeas corpus* are available as a means of challenging the fact or length of a detention or incarceration.<sup>72</sup> Thus, the Graham Amendment would appear to be intended to prohibit detainees from utilizing this particular statutory procedure to bring cases into court.<sup>73</sup>

Thus, the question arises as to whether there were other alternate procedural routes by which detainees could bring suits challenging the fact or length of their detention. It would appear that a significant number of these constitutional issues could be addressed by courts even if *habeas corpus* was found to be unavailable.<sup>74</sup>

For instance, under the Graham Amendment, the United States Court of Appeals for the District of Columbia Circuit would appear to have exclusive jurisdiction<sup>75</sup> to determine the validity of decisions by either a CSRT that a detainee is an enemy combatant, and would also have exclusive jurisdiction to review military commission decisions regarding these detainees. As noted, the court's jurisdiction does provide for constitutional review of whether the standards and procedures utilized in the proceedings below were consistent with the Constitution and laws of the United States.

In addition, the Graham Amendment does not appear to limit other procedural routes which might be available to the Guantanamo detainees. As will be discussed below, there are a number of extraordinary remedies beside *habeas* that can arise when constitutional rights are at issue, but statutory remedies are found to be inadequate.<sup>76</sup>

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<sup>71</sup> *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>72</sup> Although it appears less common for challenges to prison conditions to be entertained under this procedural route, such cases can be brought. "A motion pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. N.Y. 2001). *See, e.g.*, *Rickenbacker v. United States*, 365 F. Supp. 2d 347 (E.D.N.Y. 2005) (challenging failure to provide drug and psychiatric treatment in accordance with sentencing court's recommendation).

<sup>73</sup> As discussed above, there may be limits to the extent to which the writ of *habeas corpus* may be suspended.

<sup>74</sup> See discussion, *supra*, accompanying notes 36-67.

<sup>75</sup> The Graham Amendment does not indicate whether the Supreme Court would have jurisdiction to review decisions by the Court of Appeals on a writ of *certiorari*, but various other statutes that similarly provide exclusive jurisdiction to Court of Appeals have not been interpreted to preclude Supreme Court review. *See, e.g.*, 28 U.S.C § 1295 (2005) (providing the United States Court of Appeals for the Federal Circuit exclusive jurisdiction over appeals from a variety of specialized courts). Senator Graham has indicated that the decisions of the D.C. Circuit Court under the amendment would be subject to Supreme Court review. Lindsey Graham, *Rules for Our War*, WASH. POST, Dec. 6, 2005 at A29.

<sup>76</sup> As is discussed later, the federal courts have general jurisdiction to consider allegations of violations of constitutional law, and, even absent statutory authority, have allowed cases (continued...)

**Conditions of Detention.** The Graham Amendment does not specifically address the issue of court review of the conditions of detention. However, a variety of challenges have been raised by detainees in Guantanamo regarding conditions of their detention, including such issues as whether prisoners can be held in solitary confinement<sup>77</sup> when they can be transferred,<sup>78</sup> or whether they can have contact with relatives.<sup>79</sup> Statements regarding the Graham Amendment seem to indicate that its sponsors anticipated that the amendment, by eliminating *habeas corpus* petitions, would limit the ability of detainees to seek redress regarding the conditions of their detention.<sup>80</sup>

Although cases challenging conditions in Guantanamo have been brought under writs of *habeas corpus*,<sup>81</sup> depending on the nature of the complaint, other procedural routes may be available. For instance, Guantanamo detainees have sought relief from the courts using the All Writs Act,<sup>82</sup> principally to prevent their transfer to other countries without notice,<sup>83</sup> but for other reasons too.<sup>84</sup> It is significant that use of the All Writs Act by a court is an extraordinary remedy, generally not invoked if there is an alternative remedy available.<sup>85</sup> If the courts find that *habeas corpus* relief is not available because of the Graham Amendment, then the application of the All Writs Act may be more likely.

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<sup>76</sup> (...continued)

referred to as *Bivens* actions to be brought to challenge unconstitutional behavior by government officials. See discussion accompanying notes 84-92, *infra*. Or, in a limited number of cases, federal prisoners have sought to use the remedy of mandamus to secure release from confinement. See discussion accompanying notes 93-96, *infra*. While it is not clear whether these remedies are available to detainees in Guantanamo, the Graham Amendment does not on its face preclude detainees from filing such actions.

<sup>77</sup> Paul Shukovsky, *Terrorism Suspect's Suit Tells of U.S. Abuse: Documents in Guantanamo Case Describe Extreme Isolation*, Seattle Post-Intelligencer A1 (August 6, 2004).

<sup>78</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.C. 2005).

<sup>79</sup> Josh White, *Lawyers Seek Improved Conditions for Suicidal Detainee*, The Washington Post A8 (November 5, 2005).

<sup>80</sup> See 151 Cong. Rec. S12752-54 (daily ed. November 14, 2005)(statement of Senator Lindsay Graham).

<sup>81</sup> See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005)(rejecting claims on other grounds).

<sup>82</sup> All Writs Act, 28 U.S.C. § 1651.

<sup>83</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005)(denying a preliminary injunction to provide their counsel with 30-days' notice of any proposed transfer of detainees to any place outside the U.S.); *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005)(same); *Abdah v. Bush*, 2005 U.S. Dist. LEXIS 4144 (D.D.C. 2005)(Thirteen Yemeni nationals were entitled to a TRO preventing the government from transferring them to the custody of another government).

<sup>84</sup> See *El-Banna v. Bush*, 2005 U.S. Dist. LEXIS 16880 (2005) (seeking preservation of records relating to treatment of detainees).

<sup>85</sup> *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 196 (D.D.C. 2005).

Prisoners in federal prison, acting under a district court's general jurisdiction to consider claims arising under the Constitution,<sup>86</sup> have sometimes sought writs of mandamus<sup>87</sup> to obtain changes in prison conditions.<sup>88</sup> These writs, which are directed against government officials, have been used to require those officials to act in compliance with constitutional requirements. Although these challenges are often denied on the merits or on procedural grounds, cases have been brought based on the First Amendment,<sup>89</sup> Sixth Amendment,<sup>90</sup> Eighth Amendment<sup>91</sup> and various other grounds.<sup>92</sup> Although the use of this writ by the Guantanamo detainees does not appear to be well established,<sup>93</sup> deprivation of the right of *habeas corpus* to these detainees by the Graham Amendment may make application of this remedy more likely.<sup>94</sup>

Finally, it is possible that the detainees in Guantanamo could bring a *Bivens* action for damages against relevant government officials.<sup>95</sup> In *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>96</sup> the Supreme Court has held that suits can be brought against federal government officials directly under the Constitution for violations of

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<sup>86</sup> 28 U.S.C. § 1331. See *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986).

<sup>87</sup> Russell Donaldson, *Mandamus, under 28 U.S.C.A. §1361, To Obtain Change in Prison Condition or Release of Federal Prisoner*, 114 A.L.R. Fed. 225 (2005).

<sup>88</sup> Relief in mandamus is generally available where: (1) the plaintiff can show a clear legal right to the performance of the requested action; (2) the duty of the official in question is clearly defined and nondiscretionary; (3) there is no other adequate remedy available to the plaintiff; (4) there are other separate jurisdictional grounds for the action. *Id.* at 1(a). A writ of mandamus may issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable." *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.C.D.C. 2004), *quoting* *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995).

<sup>89</sup> See *Long v. Parker*, 390 F.2d. 816 (3<sup>rd</sup> Cir. 1968) (prisoner suit to obtain access to religious weekly newspaper stated a valid cause of action worthy of a factual hearing).

<sup>90</sup> *Stover v. Carlson*, 413 F. Supp. 718 (D. Conn. 1976) (ending federal prison practice of opening privileged communications outside of prisoner's presence).

<sup>91</sup> *Fullwood v. Clemmer*, 206 F. Supp. 370 (D. D.C. 1962) (keeping prisoner in solitary confinement for more than two years for minor disciplinary infractions violates the Eighth Amendment). It should be noted that where a prisoner has not yet been convicted of a crime, a challenge to conditions of detentions may sound in Due Process rather than as an Eighth Amendment challenge. *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>92</sup> See generally Russell Donaldson, *supra* note 57.

<sup>93</sup> See *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D. D.C. 2004) (rejecting argument that the Hostage Act requires the President to seek release of plaintiff from custody of the Saudi Arabian government).

<sup>94</sup> *Housley v. U.S.*, 1992 U.S. App. LEXIS 26368 (9<sup>th</sup> Cir.).

<sup>95</sup> See John Boston, Daniel E. Manville, *Prisoners' Self-Help Litigation Manual* (3<sup>rd</sup> Ed. 1995). There is also limited authority to indicate that a plaintiff may seek an injunction as part of a *Bivens* claim. *Sheptin v. United States*, 2000 U.S. Dist. LEXIS 12999, \*6 (N.D. Ill. Sept. 1, 2000).

<sup>96</sup> 403 U.S. 388 (1971).

the Fourth Amendment. The Court has also explicitly provided that such suits are available to federal prisoners alleging cruel and unusual punishment in violation of the Eighth Amendment.<sup>97</sup> Again, this remedy is most likely to be available where Congress has not provided an adequate remedy for constitutional violations.<sup>98</sup> However, it should be noted that the number of successful *Bivens* actions appears to be relatively small, and state actors in certain roles, such as federal agency enforcement officials, may have absolute immunity from damage suits.

## Congressional Authority Over Federal Courts

As noted, sponsors of the Graham Amendment have indicated that the intent of the language which passed the Senate was, in part, to limit the ability of detainees to bring cases challenging the conditions of their detention. To the extent that such challenges are based on constitutional considerations, however, the question arises as to whether Congress can impose such limitations. This issue might not be reached by the courts, however, if it is determined that alternative procedures to challenge an alleged constitutional violation are available. If it is determined that no alternative procedure is available to vindicate constitutional rights, however, or such alternatives are later foreclosed, then it might be argued that the Congress's limitation on the use of *habeas corpus* by the detainees is an unconstitutional limitation.

The Constitution contains few requirements regarding the jurisdiction of the federal courts. Article III, Section 1, of the Constitution provides that

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.<sup>99</sup> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Although Article III provides for a Supreme Court headed by the Chief Justice of the United States,<sup>100</sup> nothing else about its structure and its operation is specified,

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<sup>97</sup> *Carlson v. Green*, 446 U.S. 14 (1980)(Court allowed a *Bivens* action against federal prison officials for failing to provide adequate medical treatment).

<sup>98</sup> In *Carlson*, the Supreme Court held that a *Bivens*-type action cannot be brought in situation: where defendants (1) demonstrate special factors counseling hesitation in the absence of affirmative action by Congress, or (2) show that Congress has provided a sufficient alternate remedy.

<sup>99</sup> The latter part of this quoted language dovetails with clause 9 of § 8 of Article I, under which Congress is authorized “[t]o constitute tribunals inferior to the supreme Court.”

<sup>100</sup> Although the position of Chief Justice is not specifically mandated, it is referenced in Article I, § 3, Cl. 6, in connection with the procedure for the Senate impeachment trial of a President:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be

(continued...)

so the size and composition of the Court, as well as the specifics, if any, of the lower federal courts, is left to Congress.<sup>101</sup> Utilizing its power to establish inferior courts, Congress has also created the United States district courts,<sup>102</sup> the courts of appeals for the thirteen circuits,<sup>103</sup> and other federal courts.<sup>104</sup>

On its face, there is no limit on the power of Congress to make exceptions to and regulate the Supreme Court's appellate jurisdiction, to create inferior federal courts and to specify their jurisdiction. However, that is true of the Constitution's other grants of legislative authority in Article I and elsewhere, which do not prevent the application of other constitutional principles to those powers. "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas," Justice Black wrote for the Court in a different context, but "these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."<sup>105</sup> Justice Harlan seems to have had the same thought in mind when he said that, with respect to Congress's power over jurisdiction of the federal courts, "what such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the Constitution."<sup>106</sup>

Thus, it is clear that while Congress has significant authority over administration of the judicial system, it may not exercise its authority over the courts in a way that violates constitutional rights such as the Fifth Amendment due process clause or precepts of equal protection. For instance, Congress could not limit access to the judicial system based on race or ethnicity.<sup>107</sup> Nor, without amendment of the Constitution, could Congress provide that the courts may take property while denying

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<sup>100</sup> (...continued)

convicted without Concurrence of two-thirds of the Members present.

<sup>101</sup> By the Judiciary Act of 1789, it was established that the Court was to be composed of the Chief Justice and five Associate Justices. The number of Justices was gradually increased to ten, until in 1869 the number was fixed at nine, where it has remained to this day.

<sup>102</sup> 28 U.S.C. §§ 81-131, 132.

<sup>103</sup> 28 U.S.C. §§ 41, 43 (District of Columbia Circuit, First Circuit through Eleventh Circuit, Federal Circuit).

<sup>104</sup> See, e.g., 28 U.S.C. §§ 151 (U.S. bankruptcy courts); 251 (U.S. Court of International Trade).

<sup>105</sup> *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

<sup>106</sup> *United States v. Bitty*, 208 U.S. 393, 399-400 (1908).

<sup>107</sup> Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L.L. Rev. 129, 142-43 (1981). For instance, segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience, *Johnson v. Virginia*, 373 U.S. 61 (1963), or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. *Hamilton v. Alabama*, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

a right to compensation under the takings clause.<sup>108</sup> In general, the mere fact Congress is exercising its authority over the courts does not serve to insulate such legislation from constitutional scrutiny.

## Separation of Powers Issues

It is also clear that Congress may not exercise its authority over the courts in a way that violates precepts of separation of powers. The doctrine of separation of powers is not found in the text of the Constitution, but has been discerned by courts, scholars and others in the allocation of power in the first three Articles, i.e., the “legislative power” is vested in Congress, the “executive power” is vested in the President, and the “judicial power” is vested in the Supreme Court and the inferior federal courts. That interpretation is also consistent with the speeches and writings of the framers. Beginning with *Buckley v. Valeo*,<sup>109</sup> the Supreme Court has reemphasized separation of powers as a vital element in American federal government.<sup>110</sup>

The federal courts have long held that Congress may not act to denigrate the authority of the judicial branch. In the 1782 decision in *Hayburn’s Case*,<sup>111</sup> several Justices objected to a congressional enactment that authorized the federal courts to hear claims for disability pensions for veterans. The courts were to certify their decisions to the Secretary of War, who was authorized either to award each pension or to refuse it if he determined the award was an “imposition or mistaken.” The Justices on circuit contended that the law was unconstitutional because the judicial power was committed to a separate department and because the subjecting of a court’s opinion to revision or control by an officer of the executive or the legislative branch was not authorized by the Constitution. Congress thereupon repealed the objectionable features of the statute.<sup>112</sup> More recently, the doctrine of separation of

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<sup>108</sup> The Fifth Amendment provides that no “private property [ ] be taken for public use without just compensation.”

<sup>109</sup> 424 U.S. 1, 109-43 (1976).

<sup>110</sup> It is true that the Court has wavered between two approaches to cases raising separation-of-powers claims, using a strict approach in some cases and a less rigid balancing approach in others. Nevertheless, the Court looks to a test that evaluates whether the moving party, usually Congress, has “impermissibly undermine[d]” the power of another branch or has “impermissibly aggrandize[d]” its own power at the expense of another branch; whether, that is, the moving party has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988). See also *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252 (1991).

<sup>111</sup> 2 Dall. (2 U.S.) 409 (1792). This case was not actually decided by the Supreme Court, but by several Justices on circuit.

<sup>112</sup> Those principles remain vital. See, e.g., *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith

(continued...)

powers has been applied to prevent Congress from vesting jurisdiction over common-law bankruptcy claims in non-Article III courts.<sup>113</sup>

Allocation of court jurisdiction by Congress is complicated by the presence of state court systems that can and in some cases do hold concurrent jurisdiction over cases involving questions of federal statutory and constitutional law. Thus, the power of Congress over the federal courts is really the power to determine how federal cases are to be allocated among state courts, federal inferior courts, and the United States Supreme Court. Congress has significant authority to determine which of these various courts will adjudicate such cases, and the method by which this will occur. For most purposes, the exercise of this power is relatively noncontroversial.

As regards the instant proposal, however, there appears to be little chance of state courts exercising jurisdiction over the detainees in Guantanamo Bay.<sup>114</sup> Consequently, the issue here appears to be, not where the cases of the Guantanamo detainees will be heard, but whether such cases will be heard in any court, whether state or federal. Although the Supreme Court has not specifically addressed the issue of the withdrawal of jurisdiction from all courts to consider challenges to the actions of government officials, it would seem likely that such restrictions would be constitutionally suspect.

## **Eliminating Federal Court Jurisdiction Where There is No State Court Review**

A series of lower federal court decisions seems to indicate that in most cases, some forum must be provided for the vindication of constitutional rights, whether in federal or state courts. For instance, in 1946, a series of Supreme Court decisions<sup>115</sup> under the Fair Labor Standards Act of 1938<sup>116</sup> exposed employers to \$5 billion dollars in damages, and the United States itself was threatened with liability for over

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<sup>112</sup> (...continued)

and credit by another Department of Government.”); *Connor v. Johnson*, 402 U.S. 690 (1971).

<sup>113</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>114</sup> The Graham Amendment provides that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside of the United States.” The argument could be made, however, that this language is intended to be limited to the statutory provision it is amending, 28 U.S.C. § 2241, which only covers federal writs of *habeas corpus*. If the Amendment was found to be so limited, a Guantanamo detainee might seek a writ of *habeas corpus* in a state court relying on state statutes. *See, e.g.*, Cal Pen Code § 1473 (2005)(state writ of *habeas corpus*). Such an extraterritorial application of state *habeas* law is likely to be novel and would be specific to each state statute. Consequently, an evaluation of the likely success of such a suit is beyond the scope of this report.

<sup>115</sup> *See, e.g.*, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

<sup>116</sup> 29 U.S.C. § 201-219.

\$1.5 billion. Subsequently, Congress enacted the Portal to Portal Act of 1947,<sup>117</sup> which limited the jurisdiction of any court, state or federal, to impose liability or impose punishment with respect to such liabilities. Although the act was upheld by a series of federal district courts and courts of appeals, most of the courts disregarded the purported jurisdictional limits, and decided the cases on the merits.

As one court noted, “while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation. . . .”<sup>118</sup> The Court has also construed other similar statutes narrowly so as to avoid “serious constitutional questions” that would arise if no judicial forum for a constitutional claim existed.<sup>119</sup>

The Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights. Justice Scalia has pointed out that there are particular cases, such as political questions cases, where all constitutional review is in effect precluded.<sup>120</sup> Other commentators point to sovereign immunity and the ability of the government to limit the remedies available to plaintiffs.<sup>121</sup> However, the Court has, in cases involving particular rights, generally found a requirement that effective judicial remedies be present. Thus, for instance, the Court has held that the Constitution mandates the availability of effective remedies for takings.<sup>122</sup> These cases would seem to indicate a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges.

## Conclusion

The Administration’s policy of detaining wartime captives and suspected terrorists at Guantanamo Bay Naval Station raises a host of novel legal questions regarding, among other matters, the relative powers of the President and Congress to fight terrorism. The Graham Amendment to the Senate version of the National Defense Authorization Act for FY2006 may become Congress’s first effort to impose limits on the President’s conduct of the War on Terrorism and to prescribe a role for the courts. The precise impact the amendment would have, if enacted, with respect to litigation already in the courts, is difficult to predict.

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<sup>117</sup> 29 U.S.C. § 251-262.

<sup>118</sup> *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948).

<sup>119</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>120</sup> 486 U.S. at 612-13 (Scalia, J., dissenting).

<sup>121</sup> *Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987)(Bork, J., dissenting).

<sup>122</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).